

# **ENVIRONMENTAL CRIMES IN MILITARY ACTIONS AND THE INTERNATIONAL CRIMINAL COURT (ICC) – UNITED NATIONS PERSPECTIVES**

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**Joe Sills, Jerome C. Glenn, Elizabeth Florescu and  
Theodore J. Gordon**

**April 2001**

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The views expressed in this report are those of the author(s) and do not necessarily reflect the official policy or position of the Department of Defense, Department of the Army, or the U.S. government.

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The mission of Army Environmental Policy Institute (AEPI) is to assist the Army Secretariat in developing proactive policies and strategies to address environmental issues that may have significant future impacts on the Army. In the execution of this mission, AEPI is further tasked with the identification and assessment of the potential impacts on the Army of emerging environmental issues and trends.

\* \* \* \* \*

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## **ABSTRACT**

This report examines a range of perceptions within the UN Secretariat, selected UN Missions and relevant academic and non-governmental organizations (NGO) communities about the possibilities of environmental damage during military action becoming a criminal liability for military personnel and/or their contractors in the impending International Criminal Court (ICC). It is not a study of the full ramifications of the ICC concept.

The reader is cautioned that research for this study ended in Spring 2001. On April 11, 2002, more than enough countries had signed and ratified the Treaty to trigger its entry into force at a planned ceremony on July 1, 2002. This study provides baseline information for understanding future developments regarding environmental cases or issues in cases that might be taken before the Court.

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## 1. Executive Summary

This report examines a range of perceptions within the UN Secretariat, selected UN Missions and relevant academic and non-governmental organizations (NGO) communities about the possibilities of environmental damage during military action becoming a criminal liability for military personnel and/or their contractors in the impending International Criminal Court (ICC).

As of this writing, the Rome Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Doc. UN/A/CONF.183/9, 17 July 1998) [update] has 139 signatories and 29 ratifications. Sixty ratifications are necessary to bring the Statute into force. This is expected to occur within two years. The International Criminal Court will be a permanent Court that will investigate and bring to justice individuals, not countries, who commit the most serious crimes of concern to the international community, such as genocide, war crimes, and crimes against humanity -- including widespread murder of civilians, torture, and mass rape. The ICC will be a global judicial institution with international jurisdiction complementing national legal systems.

[Editor's Note: On April 11, 2002, more than enough countries had signed and ratified the Treaty to trigger its entry into force at a planned ceremony on July 1, 2002.]

Crimes against the environment were given very little attention in the negotiations which led to the ICC Statute. Although the concept of "environmental crime" is becoming increasingly understood, in the short-term it clearly has not been given high priority.

Two definitions of environmental crime are suggested by Mary Clifford<sup>1</sup>:

1. A broad philosophical definition: *An environmental crime is an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage.* [The authors consider that addition of political gain should also be included in such a definition.]
2. A practitioners' definition for a legal framework: *An environmental crime is any act that violates an environmental protection statute.*

There are 240 environmentally related international treaties, conventions, and protocols.<sup>2</sup> Most of these were written in the last 20 years. The notion of environmental crime is more and more often used in official literature by NGOs, international organizations, and investigating organizations.<sup>3</sup> In the last several years, environmental crime was mentioned on several occasions in relation to

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<sup>1</sup> Mary Clifford. 1998. *Environmental Crime: Enforcement, Policy, and Social Responsibility*. Gaithersburg, MD: Aspen Publishers. pp 26.

<sup>2</sup> *State of the World 2001*. 2001. The Worldwatch Institute, Washington, DC. pp. 167

<sup>3</sup> Worldwatch Institute, NATO, UNEP, Interpol, USEPA, and observations in NGO meetings.

military actions.<sup>4</sup> Also, there is consensus that more enforcement is needed in most environmental related treaties, conventions, and protocols in order to make them efficient.

The Rome Statute has one paragraph that refers to environmental damages as war crimes: Article 8(2)(b)(iv):

*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;*

There are three ways a case may come before the Court: referral by a State Party to the Statute; referral by the UN Security Council; or initiation of an investigation by the Prosecutor of the ICC.

For the court to have jurisdiction, several stringent conditions must be met. The act must be:

1. Among “the most serious crimes of concern to the international community as a whole” (Preamble, par. 4, Doc. UN/A/CONF.183/9, 17 July 1998);
2. The result of an attack specifically intended to create that damage; “collateral” damage would not come under the Court’s jurisdiction (in the words of one of the interviewees, the Statute “is about war crimes, not mistakes”);
3. Launched with the knowledge that it would cause “long-term and severe damage to the natural environment” which would be “clearly excessive” to anticipated military gains; and
4. If the above three conditions were met, the principle of “complementarity” would come into play. The ICC will complement national procedures, not replace them. If a country has legal mechanisms to address the crime, and they are functioning properly, the ICC would not have jurisdiction.

All cases are filtered by a three-judge panel. If a series of frivolous cases flooded the court, they would not pass the panel.

These stringent requirements to hear a case for environmental crimes committed during military action make it extremely unlikely that this would occur in respect to multilateral UN peace-keeping and/or peace making operations, though more likely following unilateral actions, since there would be fewer parties to decisions.

This was the unanimous conclusion of some twenty individuals, all participants involved in and/or very knowledgeable of the process that created the ICC, who were interviewed (not for attribution) or were referenced in this study. This conclusion is borne out by an analysis of the process by which such a case would have to come before the Court and tested through commentary on five scenarios of potential cases.

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<sup>4</sup> Kosovo bombing debate and the Lebanese House Speaker Nabih Berri who asked the Lebanese government and international monitoring bodies to launch an official inquiry into Israel's reported use of depleted uranium weapons.

## 2. Introduction and Background

There is an increasing international awareness that some military actions should be considered environmental crimes. UN doctrine on environmental crimes during military actions is still evolving. The International Criminal Court is expected to be established within several years. As a result, it is not clear what military actions by individuals could be brought to the ICC in the foreseeable future.

To bring some clarity to this uncertainty, the authors began by studying documents, articles, and books on the Rome Statute and on environmental crime. Interviews were conducted with individuals involved in the evolution of the ICC about the possibilities of charging military personnel and/or their contractors for environmental crimes committed during military action to be tried in the ICC (see Appendix A for list of participants). The leading NGO email list on ICC issues <icc-info@egroups.com> was monitored between August 2000 and March 2001 to track the evolving range of views on the ICC. In addition, short scenarios or vignettes were written, as tools of the research to illustrate potential environmental crimes that could occur during military action. Comments were collected on possible outcomes and ICC actions that might result from these vignettes. Sections of the initial draft were then circulated to those listed in Appendix A for comments prior to submission.

In light of much literature and recent controversy about the relationship of the ICC to the U.S., and U.S. participation in the ICC, it is essential to make it clear that the report is not “U.S.-specific,” i.e., it covers UN military peace-keepers and peace-makers generically. However, since the U.S. is the only State to make a major and continuing argument that all of its citizens, especially its military, be given what amounts to ironclad immunity from prosecution by the Court, the points and counterpoints raised by and in response to the U.S. inevitably weigh heavily in the analysis.

Important parts of the Rome Statute relevant to this study are highlighted in the text and reproduced in full in the Appendix E. Reference to the rapidly expanding literature on the Court is recommended to gain a complete picture. The authors of this study consider the book *The United States and the International Criminal Court: National Security and International Law*<sup>5</sup>, edited by Sarah B. Sewell and Carl Kaysen, as a very useful reference on the process of creating the Court.

### 2.1 Evolution of the ICC

The roots of the ICC can be traced back to the Hague conferences of 1898 and 1907 which attempted to regulate warfare. After the savagery and slaughter of World War I, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, a body established by the 1919 Preliminary Peace Conference, proposed the creation of a “high tribunal” to try “all enemy persons alleged to have been guilty of offenses against the laws and customs of war and the laws of humanity.” However, nothing came of that effort.

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<sup>5</sup> Sarah B. Sewell and Carl Kaysen, ed. 2000. *The United States and the International Criminal Court: National Security and International Law*. Rowman and Littlefield Publishers, Lanham, MD.

The end of World War II – with atrocities that far outstripped those of World War I – led to the creation of the Nuremberg and Tokyo tribunals. Leila Nadya Sadat describes Nuremberg as “a watershed event in the ICC’s progression from the drawing board to concrete reality.”<sup>6</sup> She goes on to say that the Nuremberg Tribunal both rejected defendants’ arguments based on state sovereignty and affirmed the primacy of international law over national law.

Immediately after the war, in conjunction with consideration of the Convention on the Prevention and Punishment of the Crime of Genocide, the UN considered establishing a permanent international criminal court, but the attempt stalled. While there was some activity in the UN over the next few decades, it was not until 1992 that a working group of the UN’s International Law Commission (ILC) produced a report, as directed by the General Assembly, the proposals of which (including comments from governments) were incorporated into a sixty-article Draft Statute adopted by the ILC in 1994.

This process was given considerable impetus by the creation by the UN Security Council in early 1993 of the International Criminal Tribunal for the Former Yugoslavia and, in 1994, of the International Tribunal for Rwanda. In the minds of many, the establishment of these two ad hoc bodies underlined the urgent need for a permanent international institution that would be ready for any situation.

The General Assembly in 1995 established a Preparatory Committee (PrepCom) charged with “preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step toward consideration by a conference of plenipotentiaries.” [A/RES/50/46 (1995)] In 1996 and 1997 the PrepCom held six sessions and in April 1998 produced a text for consideration by a diplomatic conference. After five weeks of difficult and often acrimonious discussion and negotiation in Rome from 15 June to 17 July of that year, the ICC Statute was approved by a vote of 120 to 7 with 21 abstentions.

In accordance with Article 128 of the Rome Statute, the ICC will come into force on the first day of the month following a period of sixty days after the sixtieth member nation deposits its instrument of ratification, acceptance, approval, or accession with the Secretary General of the United Nations.

[Editor’s Note: On April 11, 2002, more than enough countries had signed and ratified the Treaty to trigger its entry into force at a planned ceremony on July 1, 2002.]

The US signed the Treaty on December 31, 2000, “to reaffirm our strong support for international accountability,” President Clinton said. “We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice.” With signature, we will be in a position to influence the evolution of the court. Without signature, we will not.<sup>7</sup> However: “Chances are, it will never be ratified [by the U.S.],” said international law expert and former Justice Department official Lee Casey. Secretary of State, General Colin Powell, reiterated the opposition to the International Criminal Court during his first visit to the UN: “We have no plans to send it

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<sup>6</sup> Leila Nadya Sadat. 2000. *The Evolution of the ICC: From The Hague to Rome and Back Again.* pp. 35.

<sup>7</sup> *New York Times*, January 1, 2001

forward to our Senate," he said.<sup>8</sup> Sewell and Kaysen note: "The question now appears not to be whether the United States should join the Court, but, rather whether the United States will be able to coexist with the Court."<sup>9</sup>

[Editor's Note: On May 6, 2002, the United States, never having ratified, withdrew its previous Treaty signature of December 2000.]

The PrepCom will continue to meet until the ICC Statute comes into force, with the sixtieth ratification. At that point, the Assembly of States Parties, a body of states that have become parties to the treaty, will be established to oversee the work of the Court. The PrepCom will remain in existence until the conclusion of the first meeting of the Assembly of States Parties, during which it is expected that the PrepCom will forward its work - including the draft Elements and Rules - to the Assembly of States Party for final approval.

The Preparatory Commission for the International Criminal Court held a two-week session in New York (between November 27 and December 8, 2000) to work on some of the practical arrangements for the Court. At this, its sixth session, the Commission focused in particular on drafting three agreements on the financial rules and regulations of the Court, the relationship agreement between the Court and the United Nations, and privileges and immunities of the Court.

At the seventh session (between February 26 and March 9, 2001) "the coordinators for the Working Groups on the Relationship Agreement between the Court and the United Nations, the Financial Regulations and Rules, and the Agreement on the Privileges and Immunities of the Court indicated that their work would be completed at the Commission's next session, scheduled for 24 September to 5 October."<sup>10</sup> During the seventh session also met the Working Group on Rules of Procedure of the Assembly of States Parties, and the Working Group on the Crime of Aggression.

## **2.2 Brief overview of the Mandate and Rules of Procedures of the ICC**

The 13-part Statute of the ICC creates a permanent Court with the authority to investigate and bring to justice individuals who commit the most serious crimes of concern to the international community. The three categories of crimes which will initially be within the jurisdiction of the Court are genocide, war crimes, and crimes against humanity; aggression will be added later.

The ICC will be complementary to national criminal courts, acting only when the national courts are unable or unwilling to do so. At the Rome Conference, where the International Criminal Court treaty was adopted on 17 July 1998, the Commission was also requested to prepare proposals on the elements and conditions under which the Court could exercise its jurisdiction over the crime of aggression. Once agreement is reached on a legal definition of "aggression", the draft text will be presented to an International Criminal Court amendment conference, which will take place seven

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<sup>8</sup> Coalition for an International Criminal Court listserv, February 15, 2001

<sup>9</sup> Sarah B. Sewell and Carl Kaysen, ed. Op. cit. pp. 7

<sup>10</sup> UN press release, Preparatory Commission for the International Criminal Court. L/2977. 9 March 2001. <http://www.un.org/News/Press/docs/2001/l2977.doc.htm>

years after the Court becomes operational. In the meantime, the Commission has established a working group that has begun discussions on the subject and will continue until agreement is reached on a definition. Appendix B includes the presentation of Sylvia A. Fernandez de Gurmendi (Argentina), Coordinator of the Working Group on the Crime of Aggression, at the closing of the PrepCom's seventh session. It is too early to say how the evolving definition of aggression may apply to military operations.

Based in The Hague, the ICC will build on the models and jurisprudence established by the Nuremberg and Tokyo war crime tribunals, as well as the current tribunals for Rwanda and the former Yugoslavia. But, unlike these tribunals, the ICC will have a global mandate. Whereas the jurisdiction of the International Court of Justice in The Hague is restricted to States, the ICC's jurisdiction is over persons charged with the most egregious international crimes. And, unlike the Rwanda and Yugoslavian War Crimes Tribunals, which were created by and are subsidiary organs of the UN Security Council, the ICC is an independent organization, based on its own Statute, with global jurisdiction.

States Parties to the Rome Statute, the UN Security Council and the Court's Prosecutor have the power to bring cases before the Court, which will be presided over by 18 judges from 18 different countries. It will have an independent Prosecutor elected through secret ballot by States that have ratified the Statute. States parties are obliged to co-operate with the Court and must enact effective domestic implementing legislation, which will allow them to comply with the obligations arising from the Rome Statute. The Court will look to states to provide evidence, arrest suspects, and enforce the sentences it passes down.

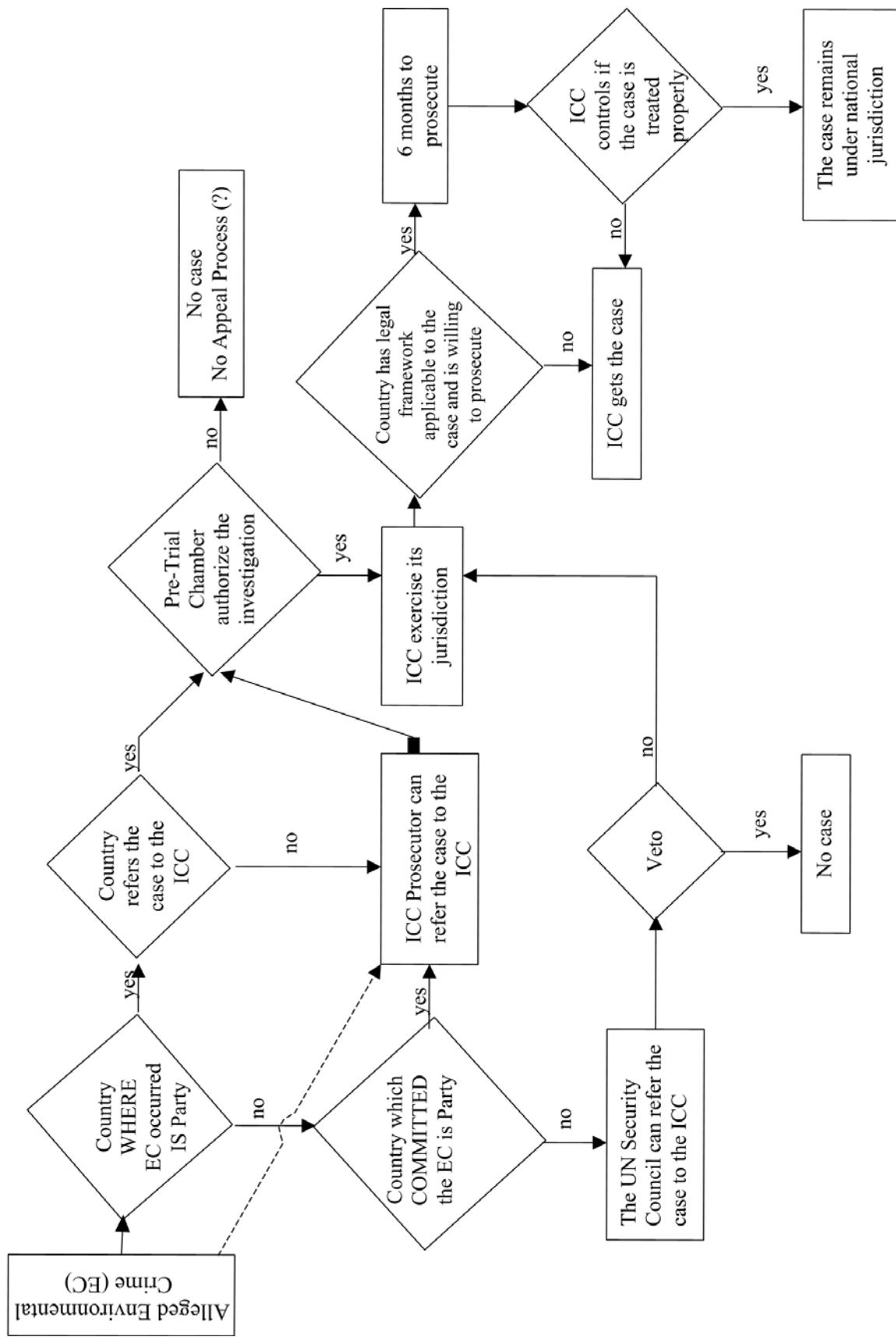
Under the principle of "complementarity", the ICC will only act when national courts are unable or unwilling to carry out the investigation/prosecution. This concept is first introduced in the Preamble to the Statute, which states, "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." (par. 10) In the words of Bartram S. Brown, Professor of Law at the Illinois Institute of Technology and legal adviser to the Trinidad and Tobago delegation in Rome: "Under the principle known as 'complementarity,' the ICC is to function as a jurisdictional 'safety net' only when there is no alternative forum to prosecute those linked to serious international crimes."<sup>11</sup>

The Flow diagram in Figure 1 shows the avenues and rules of procedures through which a case of an alleged environmental crime can be prosecuted in the ICC.

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<sup>11</sup> *The Status of the ICC: Past, Present and Future* by Bartram S. Brown, in Sarah B. Sewell and Carl Kaysen, ed. Op. cit. pp. 73-74.

Figure 1

**Flow chart on the avenues an Environmental Crime can be prosecuted in the ICC**

## 2.3 The Status of Environmental Crime

The Working Group on Compliance and Enforcement of the Environmental Convention that met in Geneva in December 1999 concluded that environmental crime is the violation of environmental law and regulations. Where these activities involve illegal movements across national boundaries, or international areas, or arrangements for such movements, they can be termed international environmental crimes.

Chapter 39 of the UN Agenda 21 contains an environmental crimes provision that dealt with the use of unilaterally set environmental standards as barriers to trade, compliance with international agreements, and prevention of deliberate large-scale destruction of the environment (the so called 'environmental crimes provision'). The provision proved difficult to interpret. The United States and many G-77 members insisted that the provision be limited to times of war. The European Community led the cause for a broader formulation to include also times of peace. The US argued that a broader formulation would undermine the discussion on the law of wars currently taking place in the UN. G-77 countries argued that the broader formulation would authorize the UN to scrutinize unduly domestic environmental practices. After a hard-fought battle, it was agreed to restrict the provision to times of war.

During the 1972 UN conference on the environment held in Stockholm, governments had agreed to develop international law for victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdiction. This commitment would be satisfied by the creation of the ICC with jurisdiction over international environmental crimes.

Previous AC/UNU Millennium Project research<sup>12</sup> reveals that there is only one formal environmental security guideline in UN doctrine for military action. The UN Secretary-General's Bulletin of 6 August 1999 entitled "Observance by United Nations Forces of International Humanitarian Law" states:

*The United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, **widespread, long-term and severe damage to the natural environment.** (paragraph 6.3) [bold emphasis added].*

The position that prevails among States, scholars, NGOs, and other experts is that the substantive law on international environmental crimes is adequate for the moment. The Office of the Legal Adviser in the US Department of State has identified nine specific customary law provisions pertaining to the protection of the environment during armed conflicts. Articles 22-23 and 55 of the 1907 Hague Regulations, and articles 53-55 and 147 of the 1949 Geneva Convention are cited and, among other customary law principles, those of military necessity, proportionality and humanity.

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<sup>12</sup> *United Nations Doctrine for Managing Environmental Security.* 1999. AC/UNU Millennium Project. Washington, DC. <<http://acunu.org/env-sec1.html>>

### 3. Analysis of the likelihood of environmental damage during military actions becoming crimes before the ICC

During the meetings, which led to the Rome Statute, there was a sense that all peoples should be equal before the ICC. There was no appreciable objection to affording the UN Security Council the right to refer cases to the ICC<sup>13</sup>, but there was overwhelming opposition to restricting this right only to the Security Council and States Parties to the treaty. It was felt that a third avenue (which became a Prosecutor of the ICC) was needed. Likewise, reflecting the General Assembly antecedents of the ICC, there was broad, though not unanimous, commitment among the delegations to the proposition that all states were equal under the statute, with no special provisions (such as the Security Council veto) given to one or a small number of states.

The International Criminal Court was created to enforce existing law, not to create new law. Articles 6, 7 and 8 – on genocide, crimes against humanity, and war crimes – in the words of one interviewee “basically incorporate what the law is and try not to open up new areas.”

Part 2 of the statute is entitled “Jurisdiction, Admissibility and Applicable Law.” Article 5 of Part 2 states:

“1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. (emphasis added) The Court has jurisdiction in accordance with this Statute with respect to the following crimes: a) The crime of genocide; b) Crimes against humanity; c) War crimes; and d) The crime of aggression.”

Article 8 of Part 2 states:

“1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” (emphasis added)

This is followed by a list of nine specific actions, which constitute war crimes (see Appendix B).

The Statute then lists “Other serious violations of the laws and customs applicable to international armed conflict, within the established framework of international law...” These include:

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;”

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<sup>13</sup> Under the UN Charter, the Security Council has the “primary responsibility for the maintenance of international peace and security” (Chap. 5, art. 24).

One of the US negotiators at Rome stated that “we lack a treaty-based customary international law norm that can be easily translated into a criminal provision. 8(2)(b)(iv) was painstakingly negotiated; it perhaps represents the most debated, carefully worded offense in the list.”

A representative of a permanent member of the Security Council who was instrumental in the negotiation of this section observed, when interviewed, that one reason there was not a great deal of discussion in Rome on 8(2)(b)(iv) – a fact agreed upon by all interviewed – was that there was a considerable amount of comfort with the provisions that frame this clause, as well as the precise wording of the language on environmental crimes. To recapitulate, they would have to be:

- among “the most serious crimes of concern to the international community as whole.”
- be “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”
- be the result of “Intentionally launching an attack in the knowledge that such an attack will cause ... widespread, long-term and serious damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;”

These provisions clearly set the bar very high for ICC action.

“The use of nuclear, chemical, or biological weapons was specifically excluded from the jurisdiction of the ICC.”<sup>14</sup> However, relevant crimes essentially already exist in art 8(2)(b)(xvii) & (xviii):

- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

The elements of these offenses are defined broadly enough that they essentially subsume most if not all uses that would constitute war crimes -- especially if the proportionality offense of 8(2)(b)(iv) is also considered.

Article 11 of part 2 states: “The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.” Article 12 states that: “A State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.”

Article 13 is critical in light of the possibility of charging military personnel in Peace-keeping and/or Peace-making operations of crimes for which they would be tried in the International Criminal Court. It outlines three avenues by which the Court may exercise its jurisdiction with respect to a

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<sup>14</sup> Sarah Sewall and Carl Kaysen. 2000. *The United States and the International Criminal Court: The Choices Ahead*. American Academy of Arts and Sciences. Cambridge, MA. pp. 8.

crime referred to it in Article 5: (a) referral to the Prosecutor by a State Party; (b) referral by the Security Council of the United Nations; and, (c) initiation of an investigation by the Prosecutor.

The second of these three avenues is the easiest to address. If the Security Council decided that a military action had resulted in “widespread, long-term and severe damage to the natural environment” and referred the case to the ICC, those responsible would, without question, be liable for war crimes. However, under the UN Charter, a decision taken by the Security Council must have the affirmative vote of nine of the fifteen members and, other than on procedural matters, the nine votes “must include the concurring votes of the permanent members....”: China, France, the Russian Federation, the U.S. and the UK (Article 27, Section 3). Any one of the five permanent members could thus veto a referral to the Court.

In preparing the case, the Prosecutor would, of course, be bound by all the conditions noted above (i.e., the “high bar”). In addition, the critical principle of complementarity would come into play. Given the central role of the Security Council in the maintenance of international peace and security, the acceptance by the state in which the crime was alleged to have been committed would not be required for the Court to exercise jurisdiction. It could be expected, though not assured, that any referral from the Security Council would be given very high priority by the Court.

The first avenue of jurisdiction is referral by a State Party to the Statute. (Article 14) Should a State Party feel that a crime against the environment has been committed by military action within its territory or elsewhere, even if the alleged violator were a national of the State, which was not a party to the Statute, that State may refer the situation to the Prosecutor. The Prosecutor will be required to act once it is determined that the case is within the jurisdiction of the Court, i.e., that it clears the “high bar.”

The question that arises – and which has been the source of fierce debate – relates to a situation where the State from which the military action originated is not a Party to the treaty. The serious concern this question raises in U.S. circles is illustrated by the statement U.S. Senator Jesse Helms, R, NC, Chairman of the Senate Foreign Relations Committee, made at a meeting of the UN Security Council on January 20, 2000. He asserted that a claim by any Court not recognized by the U.S. that it had jurisdiction over American citizens would never be accepted by the U.S. Several UN representatives responded to Senator Helms’ concerns. Among them, Ambassador Robert Fowler (Canada) observed that in creating the ICC, the international community was following an approach championed by the U.S. at Nuremberg. He further noted that since the ICC would defer to democratic states with effective judicial systems for prosecuting war crimes, the ICC would not lead to the prosecutorial free-for-all feared by Senator Helms. However, the Senator remained unconvinced<sup>15</sup>. The Senator expressed even stronger views in opposition to the ICC, referring to it as “this new international kangaroo court,” in a press release issued on December 31, 2000 following the signing of the Statute by the U.S. earlier that day.

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<sup>15</sup> Noted in AJIL, Vol. 94, No. 2, p. 532-4

In his analysis of ICC jurisdiction in such a situation, Michael P. Scharf, Professor of Law and Director of the Center for International Law and Policy at the New England School of Law, develops the following scenario<sup>16</sup>:

Had the ICC been in existence on August 20, 1998, when the U.S. bombed the Al Shiffa pharmaceutical plant in Sudan, “Sudan could have initiated proceedings potentially leading to an international indictment and arrest warrant for the U.S. personnel responsible for the air strike on the Al Shiffa plant (possibly including the President, the Secretary of Defense and military commanders involved).” Since this plant produced pharmaceuticals and perhaps (as the U.S. claimed) chemical weapons, the results of the attack could well have included immediate and continuing damage to the environment (i.e., air and water quality in an urban area) and this could have been part of the Sudanese complaint.

Scharf continues: “As a non-party to the Treaty of Rome, the United States would not be obligated to provide evidence or to surrender accused persons within its territory to the ICC in such a proceeding. However, under Article 12 of the Rome Treaty, U.S. refusal to become a party would not bar the ICC from issuing an indictment charging American citizens with war crimes or crimes against humanity committed in the territory of Sudan.” Even though the publicity involving this hypothetical case could be embarrassing to the United States, the “high bar” set by the Statute would not have been cleared: the bombing of the plant could not be characterized as an attack launched intentionally “in the knowledge that such an attack will cause... widespread, long-term and serious damage to the natural environment.” The immediate purpose of the attack was to destroy the plant; as noted earlier, collateral damage is not covered.

U.S. Ambassador David Scheffer argued strongly in testimony before the Senate Foreign Relations Committee that “the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations....”<sup>17</sup>

At Rome, the United States proposed that for the Court to exercise jurisdiction over crimes against humanity or war crimes (but not genocide) the consent of the state of nationality of the offender should be required as a precondition. This was strongly criticized by most other nations at Rome. They pointed out that it ran counter to numerous precedents regarding other international crimes including terrorism and hijacking. One interviewee called it “patently absurd” to put a clause in the treaty which “would not give it jurisdiction over a Saddam Hussein, Pol Pot, or Idi Amin unless the States of which they were nationals had ratified the treaty.” The U.S. proposal was defeated. Instead, the formulation codified in the final text of Article 12 requires as a precondition to the exercise of jurisdiction that a State party to the Statute be either the state on the territory of which the conduct occurred or the state of which the accused person is a national. The United States then proposed an amendment to Article 12 by which nationals of a non-party state would be exempted

<sup>16</sup> Sarah B. Sewell and Carl Kaysen, ed. 2000. *The United States and the International Criminal Court: National Security and International Law*. Rowman and Littlefield Publishers, Lanham, MD. pp. 213 ff.

<sup>17</sup> Statement before the Committee on July 23, 1998

from ICC jurisdiction where the case arose from official actions of the non-party state as defined by the non-party state, i.e., not by the Court. This proposal was also defeated.

It should be noted that while Ambassador Scheffer's arguments referred to "U.S. armed forces operating overseas," the objections would be the same whether they were on a unilateral mission or part of a multilateral peacekeeping mission, as in Kosovo or in the earlier Desert Storm campaign against Iraq.

Returning to Article 13, the third avenue through which the Court may exercise its jurisdiction is through an investigation launched by the Prosecutor on his/her authority.

In Rome, there was a growing feeling among the "like minded group" – an informal coalition of (eventually) more than 60 States, including most of the closest allies of the U.S., which were linked by the high priority they gave to the successful conclusion of the Rome negotiations and the creation of the Court – and the NGOs that referrals by the Security Council or by States were not enough. For that reason, an "independent" prosecutor was advocated, one who could receive and evaluate information from any reliable source and initiate an investigation (with the approval of the Pre-Trial Chamber), followed by prosecution.

The Statute calls for the Prosecutor to be elected by secret ballot cast by States that have ratified the Statute. The Prosecutor can be dismissed for misconduct by a majority vote. In addition, any defendant who alleges inappropriate prosecution by the Court would be entitled to review by up to three separate judicial panels.

The U.S., primarily, objected strenuously to this. Ambassador Scheffer argued, "...such a prosecutor would be inundated with complaints from Day One. His fax machine would be permanently jammed up." More substantively, he argued: "States are accountable to their polities: the members of the Security Council are accountable to theirs. But who would this independent prosecutor be accountable to?" Others scoffed at this argument, noting the numerous checks built into the Statute.<sup>18</sup>

At this point, the principle of "complementarity" should be considered. The ICC is to complement, rather than replace, or substitute for, the criminal jurisdiction of states.

Article 17(1) of the Statute, entitled "Issues of Admissibility," states that the Court shall determine that a case is inadmissible when "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution...." or when "the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute...(d) the case is not of sufficient gravity to justify further action by the Court."

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<sup>18</sup> Quoted in Lawrence Weschler, *Exceptional Cases in Rome: the United States and the Struggle for an ICC*, in Sarah B. Sewell and Carl Kaysen, ed. Op. cit. pp. 94-95.

Article 17(2) states: “In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- “(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
- “(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- “(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

These criteria, by any reasonable standard, form a very high barrier to any effort by the Court to claim jurisdiction when an alleged crime is being dealt with by national courts. To most who analyze them, they would effectively insure that, if a State were dealing with the matter, the ICC would not enter the picture. This would especially be the case with democratic states with independent judicial systems. In addition, the outline of the principle of complementarity in the Statute is followed (in Articles 18 and 19) by an elaborate set of procedural requirements which provide extensive safeguards against overreach by the Court.<sup>19</sup>

However, the bottom line for U.S. negotiators was the absence of a guarantee that the Court would, in every instance, respect the U.S. handling of a case, even if the United States had decided not to prosecute. There is no such absolute guarantee.

Where does this leave us, regarding possibilities of military personnel on peace-keeping missions being tried for environmental crimes by the ICC during military actions? The short answer is: such indictments are highly unlikely, but certainly not impossible. A number of factors would have to come together.

First, although crimes against the environment are one of the war crimes listed in Article 8 almost all interviewees agreed that the prime impetus for the ICC, and thus the type of crime most likely to be given attention, was crimes against people. It would be unfair to describe the listing of environmental crimes as an afterthought, but it is clear they were not of primary concern. The language on environmental crimes was identical to most of the Geneva Protocol; it was a restatement of existing law.

Second, the Court’s jurisdiction is “limited to the most serious crimes of concern to the international community as a whole.” It is difficult to conceive of an action taken by a peace-keeping force or unilateral force, which would meet this criterion. (Article 5(1)).

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<sup>19</sup> For a discussion of these two articles see *The Status of the ICC: Past, Present and Future* by Bartram S. Brown, in Sarah B. Sewell and Carl Kaysen, ed. Op. cit. pp. 74-75.

Third, it is necessary, for the ICC to have jurisdiction, that an attack be launched intentionally;

Fourth, the attack would have to be launched “in the knowledge that such attack will cause.... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;”

Fifth, assuming, for sake of argument, that an action performed by a military personnel in a military mission satisfied the first four points, the principle of complementarity would come into play, i.e., the ICC would admit a case only when the State with jurisdiction was “unwilling or genuinely unable” to pursue it.

Here is a summary of the steps that would have to be followed if an alleged war crime were to come before the Court. (The Flowchart in Figure 1, next page, may be useful in following the steps.)

First, a case would have to be:

1. Referred by a State Party to the ICC Statute;
2. Referred by the United Nations Security Council to the ICC; or
3. Initiated by the Prosecutor (with the approval of the Pre-Trial Chamber).

Next, either the state in which the alleged crime was committed or the state of the nationality of the accused would have to accept ICC jurisdiction. (As noted earlier, no such consent is required for cases referred by the Security Council.)

The ICC Prosecutor would then be required to notify the state of which the accused was a national of its intent to begin an investigation. The state would have one month to inform the Prosecutor that a national investigation was underway. The Prosecutor would have to defer to any national investigation, as well as respect a national decision not to prosecute, unless the Pre-Trial Chamber decided by a majority vote of its three judges both that there was a reasonable basis to proceed and that the case appears to fall within the jurisdiction of the Court. Accused individuals would be allowed to make submissions to the Pre-Trial Chamber.

In regard to the specific concern expressed by the United States that the Pre-Trial Chamber could overrule a national decision not to prosecute and authorize an investigation, the Chamber would have to determine that a state was “unwilling or unable genuinely to carry out the investigation or prosecution.” Since any state with a properly functioning justice system would clearly be able to investigate and prosecute, “unwillingness” becomes the issue.

The Statute does not leave the definition to the Chamber. It specifies that there is unwillingness only when the proceedings or decision not to prosecute were used to shield the accused from criminal responsibility, where there was so long a delay as to question the intent to bring the accused to trial, or where the proceedings were not independent or impartial and were conducted in a manner inconsistent with an intent to reach justice.

Flow chart on the avenues an Environmental Crime can be prosecuted in the ICC

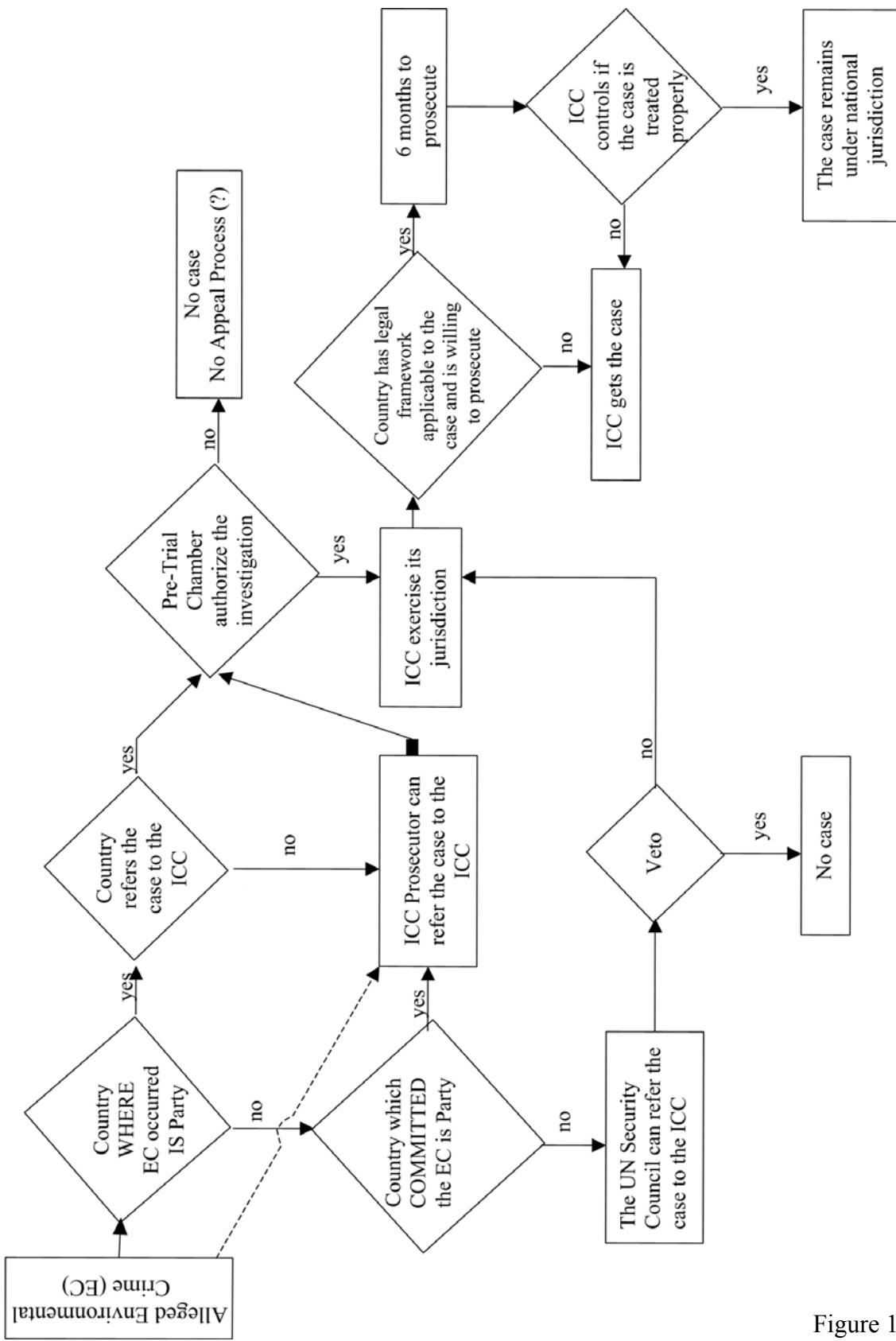


Figure 1

As Sewall and Kaysen observe: “In other words, the United States would either have to be so biased that it could not evaluate the question of international crime, have no intention of investigating the claim, or be investigating only to protect an individual. The seriousness with which the modern U.S. military justice system treats international humanitarian law makes this a virtual impossibility in the case of a military investigation. Moreover, actions – official or unofficial – of a U.S. citizen that approached the gravity of an international crime would be addressed within the American judicial system.” They conclude: “It is difficult to envision ICC judges concluding that the United States was unwilling to pursue allegations of egregious international criminal violation by Americans. Yet such a scenario, in theory, is possible.”<sup>20</sup>

Noting efforts to bring the likes of Pinochet, Mengistu and Habne to justice, Richard Goldstone, former Prosecutor of the International Criminal Tribunal on Yugoslavia, wrote: “in these circumstances, it is not difficult to conceive of a jealous domestic prosecutor or a frustrated victim launching an application against a former political leader of the US or the UK for war crimes allegedly committed in Vietnam, or the Falkland Islands, respectively.”<sup>21</sup> However, it is difficult to imagine the Court asserting jurisdiction.

This study agrees with these observations. The near-unanimous conclusion of those who participated in the ICC PrepCom process, and who have evaluated the Statute from both the standpoints of legal construction and probable implementation, is that the process is constructed so as to reduce to a minimum the chance of its abuse.

It would require what could be called a “total breakdown scenario” for the process to fail. This could come from two directions.

First, a peacekeeping force would have to be so incompetently commanded that it would be given orders to undertake actions which constituted “part of a plan or policy or … part of a large-scale commission of [war] crimes.” There would have to be an international launching of an attack “in the knowledge that such an attack will cause…widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated…” Then, under the doctrine of complementarity, the nation of which the military in question were nationals would have to refuse to deal with the matter within its own judicial system – in effect, stonewalling the process.

The other direction could come from a politically biased, incompetent and/or corrupt prosecutor who would “have it in” for one or a group (such as NATO) of states, seeking deliberately to undermine the foreign policy of the state(s) that were his or her target. In the words of Sewall and Kaysen, court opponents “fear that once the legal mechanisms are established, they could be hijacked for political purposes.” The prosecutor would then have to persuade the Pre-Trial Chamber (of three judges) to go along with his decision. Any defendant who alleges inappropriate prosecution by the ICC would be entitled to review by up to three separate judicial panels. Bear in mind that the

<sup>20</sup> Sarah Sewell and Carl Kaysen, *The United States and the International Criminal Court: The Choices Ahead*. American Academy of Arts and Sciences, Cambridge, MA. 2000. pp. 10.

<sup>21</sup> *American Journal of International Law*, vol. 94, page 416.

Prosecutor will have been elected by an absolute majority vote of States Party to the treaty, and the eighteen judges by a two-thirds majority of the States Parties present and voting. Likewise, the Prosecutor can be removed from office by a similar majority vote, and any judge by a similar two-thirds vote.

In short, as some interviewee stated it, for the above to happen “not only the Prosecutor, but the entire Court, would have to run amok.”

In conclusion, one cannot say that it is certain that no peace-keeper or unilateral military personnel could be charged with environmental crimes and tried by the International Criminal Court. One can only say that it would be highly improbable. But there can be, under the existing Statute, no ironclad guarantee.

## 4. International Perceptions of Environmental Crimes During Military Actions

### 4.1 Perceptions of environmental war crimes

Certainly the most highly visible incident of a direct assault on the environment for military reasons occurred in 1991 in Kuwait. One interviewee stated, “Kuwait was what everybody in Rome had in mind when the language on the environment was made part of the war crimes section.” Another agreed, but added that the use by the U.S. in Vietnam of Agent Orange was also on many minds.

In 1991, Iraqi troops deliberately pumped an estimated eight million gallons of oil from Kuwait’s oil terminals into the Persian Gulf in an effort to foil any attempt by Coalition forces to launch a marine assault on Kuwait. During the Iraqi retreat in February 1991, they set fire to hundreds of oil wells. In the words of Dr. Badria al-Awadi, Kuwait representative for the International Union for the Conservation of Nature: “The environmental catastrophe that happened to Kuwait is unique. Even though the air is clean now, still we don’t know the full impact of this kind of pollution. A lot of disease which we never had before we had now.” The incidence of cancer is a particular worry since it “is much higher than it was before the invasion.”<sup>22</sup> Dr. al-Awadi also stated that while it had not been firmly established that oil pollution caused all these health problems, investigation to date suggests that it is highly likely.

In addition to the deleterious effects of the Iraqi invasion, Dr. al-Awadi also stated that scientists are looking into the possibility that some of the cancers might have been caused by residues from depleted uranium (DU) munitions used by U.S. forces.<sup>23</sup>

In spite of shutting down the oil well fires and making considerable progress in cleaning up after them, as well as cleaning up the Gulf, Kuwait’s ecostructure remains badly polluted. Dr. Mohammed al-Sarawi, Chairman of Kuwait’s Environment Public Authority, stated: “We have about 20 million cubic meters of contaminated soil” and the marine environment – particularly the coral reefs — has still not recovered from the oil pumped into the Gulf. Some 320 “oil lakes,” containing an estimated 60 million barrels of oil, were created, since many of the wells detonated by Iraqi soldiers failed to catch fire but instead spewed oil into the desert.<sup>24</sup>

There was agreement among three interviewees that, had the ICC been in operation in 1991 when Iraq torched the Kuwaiti oil fields and dumped tons of oil into the Persian Gulf, the Iraqi leadership would have been prime candidates for accusation in the Courts for committing crimes against the environment. There was, however, some concern about the requirement in the Statute that the damage be long-term.

However, the Iraqi invasion of Kuwait was certainly no multilateral peace-keeping or peace-making action!

<sup>22</sup> BBC World Service. August 4, 2000

<sup>23</sup> Ibid.

<sup>24</sup> *Pollution Legacy Lives on in Kuwait*. Andrew North. BBC News Online. August 4, 2000.

## 4.2 Most recent precedents

Two ad hoc Tribunals – for Former Yugoslavia and Rwanda – were created by the Security Council, as subsidiary bodies of the Council, and a third – for Iraq – is being actively pursued for by a number of nations.<sup>25</sup>

Considerable attention was given by the media to the decision by Carla Del Ponte, the Prosecutor of the International Criminal Tribunal on Yugoslavia, not to investigate further allegations that NATO had committed war crimes during its air campaign in Kosovo in 1999. She concluded that “although some mistakes were made by NATO, I am very satisfied that there was no deliberate targeting of civilians or unlawful military targets by NATO during the bombing campaign.”

According to an interviewee close to the work of the Tribunal, Louise Arbour, Ms. Del Ponte’s predecessor as Prosecutor, was approached by six “international law types” who tried to persuade her that the NATO bombing had violated international humanitarian law; one of their allegations was that there had been crimes against the environment. The Former Republic of Yugoslavia (Serbia) had charged that the NATO bombing had constituted “environmental terrorism.” Ms. Arbour created a small, internal committee, made up of staff lawyers, to assess these allegations. Their findings were accepted and endorsed by Ms. Del Ponte, who succeeded Ms. Arbour.

While this procedure fell short of a formal investigation by the Prosecutor, the committee concluded that there had been no substantive violation of international law, and no “relevant” environmental damage (i.e., in violation of Protocol 2).

According to an interviewee, use of depleted uranium shells was a specific concern of the assessment. (Depleted uranium is extremely dense and thus increases penetration of the target. Upon impact, they can pulverize into a possibly toxic, slightly radioactive dust.)

While concern over the use of depleted uranium in Kosovo is certain to be raised again, an interviewee noted that while the use of these shells may be deplorable, in the eyes of some, it is not a war crime or a violation of international law to use them, as far as the ad hoc tribunals were concerned. For either of the two tribunals to have jurisdiction, their usage would have to be banned by the Geneva Convention, which is not the case. The “Report of the World Health Organization Depleted Uranium Mission to Kosovo, 22 to 31 January 2001,” does not give evidence that the alleged egregious impacts occurred; it does explain that DU poses heavy-metal toxic hazards and weak radiation hazards. DU is not described as an indiscriminately dangerous weapon that would meet the standards of danger and criminality ascribed to chemical and biological weapons.

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<sup>25</sup> Indict, a UK-based non-governmental organization, was reported by BBC (BBC Online News, July 25, 2000) to have a “secret team of investigators” compiling evidence to indict a number of senior Iraqi officials for war crimes. The United States is seeking international support for such prosecutions, which could be brought either under the Geneva conventions or the convention against torture. United States Ambassador David Scheffer stated that the information being prepared by Indict will be used in the effort to persuade the Security Council to establish an ad hoc war crimes tribunal for Iraq.

While ammunition containing depleted uranium can by no stretch of the imagination be called nuclear weapons, it is useful to note again that the Rome Statute does not have, at this point, any specific reference to nuclear, chemical or biological criminal use of weapons. One interviewee observed that it would be possible seven years after the coming into force of the Statute to propose amendments, under the terms of article 121. It was stated that a number of participants at Rome, particularly NGOs, had been displeased with the exclusion of these three categories of weapons. However, the interviewee opined that there was unlikely to be any change in this in the foreseeable future.

An issue in regard to Kosovo was the question of the jurisdiction of the Prosecutor as regards any actions of NATO. A source interviewed dismissed allegations that the Prosecutor was overreaching, stating that, under the terms of the Security Council resolution creating the ad hoc Tribunal, “when the NATO plane dropped the first bomb it unwittingly became subject to the jurisdiction of the Tribunal.”

While many, especially in NATO capitals, were pleased by this decision, John Bolton, former U.S. Assistant Secretary of State for International Organization Affairs, observed that “.... by actively considering the complaints, and by effectively rejecting their substantive allegations, the Prosecutor nonetheless implicitly concluded that she had jurisdiction over the incidents alleged. In short, she was asserting that, had there been sufficient evidence or credible allegations of war crimes by NATO personnel, she would have had the requisite authority to launch prosecutions against them.” He concludes: “The idea that the Security Council can create tribunals of limited scope and authority, and exercise authority over the tribunals once created, is thus already a casualty of Del Ponte’s ‘vindication’ of NATO’s aerial campaign.”<sup>26</sup>

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<sup>26</sup> *The Earth Times*. January 25, 2000, pp. 25



## 5. A range of views on Short Scenarios (vignettes) about Potential Environmental Crimes and the ICC

In order to further flesh out international perceptions of when environmental damage by military actions might be considered an environmental crime before the ICC, a series of short scenarios or vignettes was circulated for comments. The five vignettes are written in bold and the comments follow each.

**5.1 During a UN Security Council debate on sending peacekeeping forces, country X reminds the members that NATO forces were accused of an environmental crime, which was eventually dropped, and says that country X would not send troops unless they were exempt from any ICC prosecution for such crimes.**

**Comment 1:** The Security Council should decline to exempt country X in these circumstances. Accepting the troops under these conditions with an exemption would involve a breach of the Rome Statute and, probably, an agreement between the UN and X that would attempt to contravene a jus cogens norm. While the resulting agreement would, in my view, be void under art. 53 of the relevant Vienna Convention on the Law of Treaties, the UN should simply refuse to enter into it.

**Comment 2:** The UN Secretary-General requests Member States to provide troops to carry out mandates of the Security Council. He would not request troops from a Member State which attached this condition to supplying them.

**Comment 3:** This would trigger a debate on at least three fronts: 1) political implications of granting such immunity; 2) ethical dimensions; and 3) technical considerations, focusing on the question of whether, how and by whom could such exemption be granted. I would expect a strong argument would be made that granting such exemption is not within the mandate of the UN Security Council. Civil society leaders and NGOs would strongly object.

**Comment 4:** There are several possibilities:

(A) The Security Council says no to exemption. X refuses to participate in peacekeeping. Other states follow X's example.

(B) The Security Council says yes to exemption. X participates. Other participants cry foul and demand exemptions too. Successive UN peacekeeping troops want the same exemption.

(C) The Security Council says yes to some exemption. Countries want to have the guidelines for the SC's decision. Legislation will be debated and take years, never to be completed, or an unsatisfactory code is produced, leading to more questioning by UN members. States unhappy with the way exemptions are granted or that are not granted an exemption refuse to send troops on peacekeeping missions.

Alternatively or in parallel, the nature of the alleged environmental crime could be examined. If it is one that occurs incidentally or one where there may be justification, country X's concerns are legitimate and the world community should re-examine its definition of an "environmental crime", bearing in mind the context in which these offences are carried out. If country X is not convinced, it is likely that other states, too, will have doubts, leading to reduced participation in peacekeeping activities. Rather than granting exemptions based on discretion, there should be a consensus on when damage to the environment in the course of peacekeeping should be a prosecutable offence.

**Comment 5:** Country X must be held accountable for environmental crimes in spite of the history of such crimes with other parties. Previous exemptions from responsibility should not be applied to future situations; this would set the precedent that environmental crimes may be defended no matter the cost to the environment or the citizens that depend on or use that environment for their livelihood or well-being. Each situation must be reviewed and tried separately but no exemptions should be granted. Country X must be made aware that for the protection of the inhabitants of the area in question, Country X must abide by the same standards and laws or be subject to prosecution.

**Comment 6:** In assessing whether a country can, on an *a priori* basis, exclude its nationals from prosecution or otherwise thwart prosecution, it is important to assess the likelihood that the ICC would even have jurisdiction to prosecute what we call an "environmental crime" (or what the Former Republic of Yugoslavia called "environmental crimes" in its ICJ lawsuit against certain NATO member-states). The ICC understanding of "environmental crime" is quite narrow; in fact, it is likely narrower than the colloquial understanding of "environmental crime". Art. 8(2)(b)(iv) of the ICC punishes as a war crime "intentionally launching an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated." (There are other prescribed war crimes in the ICC Statute that might cover environmental desecration [e.g. pillaging, poisonous weapons] but for the most part these provisions are only concerned with environmental desecration on an ancillary basis.)

In assessing all five vignettes, the very narrow scope of Art. 8(2)(b)(iv) must be underscored. First, the elements of the offense must be proven: (1) an attack (2) launched intentionally (3) and with the knowledge it will cause (4) widespread, long-term and severe damage to (5) the natural environment. The negotiation history, international law precedents, and subsequent PrepCom negotiations define each of these elements in such a way that proving them will be no easy task for the Prosecutor. Then the defense of military advantage can exculpate otherwise impermissible conduct. An investigation can only take place if the ICC Pre-Trial Chamber (upon motion by the Prosecutor) considers there to be a "reasonable basis" to proceed and considers that the case appears to fall within the jurisdiction of the ICC. It is difficult to establish even a *prima facie* case that an "environmental crime" falls within Art. 8(2)(b)(iv). In addition, the requirement in the chapeau to Art. 8(2)(b) that there be an "international armed conflict" must be shown. Although NATO involvement in Kosovo may have constituted an international conflict, can the same be said for UN peacekeeping or peace-enforcement forces operating under duly authorized Chapter VI or VII mandates?

If UN enforcement would fall within the rubric of an "international armed conflict", jurisdiction would have to be triggered in accordance with Art. 13. As an aside, the United Nations has only

recently formally affirmed the applicability of international humanitarian law to UN peacekeeping and peace-enforcement forces. This was done in a Bulletin promulgated by the Secretary General in August 1999, which, inter alia, makes reference to prohibiting weapons designed to cause widespread, long-term, and severe damage to the natural environment.

**5.2 During a UN Security Council authorized military intervention in Country X, a secret nuclear waste storage area is damaged. After the military action, army units under UN Peacekeeping authority contract a private company to clean up the exposed nuclear waste. An accident occurs during the transportation from the site causing serious, long-term environmental damage. Country X says it wants to take the army officer in charge and the manager of the civilian contractor to the ICC for a crime against humanity.**

**Comment 1:** I don't think this one meets the threshold requirement of occurring as - part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack." If the incident is really an "accident", as your facts suggest, I doubt moreover that the mental element (intent or knowledge) is shown for any relevant crime within the jurisdiction of the ICC.

**Comment 2:** This does not meet the requirement of being part of an intentionally launched attack.

**Comment 3:** This activity is not a crime within the jurisdiction of the ICC. The ICC is meant to prosecute only those who perpetrate the most serious crimes of concern to the international community as a whole. (In this regard, it does not discriminate between military personnel or civilian personnel, as jurisdiction covers all natural persons). The definition of crimes against humanity in Art. 7 does not cover environmental damage. Even if it did, the nuclear accident would have to satisfy the chapeau requirement of being a committed (by the UN forces) as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. I doubt a transportation accident would fit in.

Similar issues arise with regard to Art. 8(2)(b)(iv). As discussed in vignette #1, elements of that offense include an "attack" and a very high mens rea requirement -- both intention and knowledge. Again, I doubt an accident would count. Even if this could be prosecuted as a crime against humanity or a war crime, I see the possibility that the Army Officer could fall outside ICC superior responsibility guidelines (i.e. if the officer has no idea or could not be expected to have an idea that the civilian contractor was about to commit a crime). As for the civilian contractor, a defense of following orders could be raised if the conduct was prosecuted as a war crime. Even if the ICC could have jurisdiction and could convict, it does not have the power to order a clean-up of the environmental blight. Nor can it issue civil damage awards against nation-states or international organizations. So, in a sense, little would be accomplished. This should get us thinking (as I have argued elsewhere) about creating a new, and different type, of international institution. Environmental harms, most of which occur on some sort of negligence/recklessness basis, may not be effectively dealt with by a court geared to punishing individual perpetrators of mass atrocity.

**Comment 4:** The actions of the Army Officer and contractor do not constitute "crime against humanity," because it is not "directed against any civilian population".

In the event that the acts are considered "crime against humanity", every military intervention becomes a potential trap. Even when professional help is sought, one is still exposed to the danger of prosecution. All decisions will have to be cleared by the Security Council, from the lowest level, choosing contractors to clear radioactive wastes, to the highest making the decision to bomb an area where there may be a nuclear waste storage facility. Businessmen, too, are not spared the risk. For anyone daring to accept the money of the UN, there would be acceptance of criminal prosecution where the contractor is negligent. It is unlikely that any businessman would want to contract with the UN.

If the army officer and contractor can be prosecuted under this charge, the definition of "crime against humanity" is too wide. This leaves room for all and sundry to be brought to trial when things go wrong. The way to approach the matter should be to consider the culpability of the persons charged.

Once the actus reus is satisfied, the presence of fault should be determined, as in all criminal cases. The Army officer in charge has limited control over the contractor. The contractor is a professional in nuclear waste removal and hence, it is natural that the Army officer would let the professionals take care of things. Unforeseeable events occur. The specifics of the accident should go to the assessment of mens rea. Negligence should be punished but the punishment should perhaps be sought in a civil trial and a domestic criminal trial instead of an international criminal trial on a charge of "crime against humanity".

**Comment 5:** The debate in this case would focus on the context in which the accident occurred. One could possibly argue a case for gross negligence, but unless intent can be demonstrated I would expect the crime against humanity argument to fail.

**Comment 6:** This case doesn't qualify because no crime is taken place. It's an accident. It might be a civil suit for negligence, initiated by the country where it occurred, but it does not qualify for the ICC.

**5.3 A country has biological weapons stored under poor management. The country denies the situation exists. External evidence is made public. Experts say that if nothing is done, deadly disease will get into the public and spread. After an initial outbreak, the UN Security Council authorizes a medical team with military escort to contain the situation. Several countries call for ICC to prosecute the officer in charge of the biological weapons storage area arguing that the inaction was a crime against humanity that could have lead to a much greater problem had not the Security Council acted quickly.**

**Comment 1:** A similar threshold problem exists here. Where is the "attack"? Even the expanded notion of an attack by inaction contained in the Elements of Crimes for crimes against humanity at footnote 6 does not seem to take you this far. One imagines that the weapons are being produced for an eventual effort against somebody (else) but on the facts given, this is far too remote.

**Comment 2:** It would have to be shown that the inaction could constitute a crime against humanity. This would be difficult (although somewhat more plausible than in vignette #2).

**Comment 3:** In this scenario, a crime against humanity has been committed. The bringing to trial of the officer in charge of the storage area will be a deterrent to other states. States will start re-examining their biological and chemical weapons storage systems. This may also prompt states facing similar problems (due to lack of funds, etc.) to come clean at the UN so that assistance may be channeled to help contain the biological and chemical weapons.

The act is directed against the civilian population when poor management is made known and there is inaction on the part of the persons in charge. In this case external evidence is made public and experts have spoken. In this scenario, the officers have "clear knowledge of the attack".

**Comment 4:** An excellent example of why an international criminal court is absolutely necessary!

**Comment 5:** There is no "intentionally launched attack;" therefore, it does not meet the requirements for the ICC.

**Comment 6:** The ICC doesn't apply to nuclear and biological weapons [cases]. Also, so far, there is no crime, hence no prosecution.

**5.4 Progress on the Kyoto Protocol is seen in most countries, but the major source of greenhouse gases refused to reduce its emissions. There is talk that this is a potential environmental crime and that the ICC should talk up the case against the President of this country to prevent a major crime against humanity.**

**Comment 1:** The ICC is not a chancery or equity court that can issue injunctions preventing harms. It can only imprison perpetrators of harms already committed or attempted. Plus, for the reasons discussed in Vignette #2, I am skeptical that this sort of conduct could be considered a war crime (there's not even an international armed conflict going on here) or a crime against humanity.

**Comment 2:** Depending on the system in place in the particular state, the President may not be the right person to prosecute. Presidents may be made scapegoats for the actions of unscrupulous businessmen. It is presumed that the emission of greenhouses gases comes about as a result of industrial activity. Unless the emission severely affects the health and lives of the citizens of the state or surrounding states (to the point that it may become a "neighbor principle" suit), this may be an unjustifiable interference in domestic policy and industry.

**Comment 3:** Similar threshold problems. It is inconceivable that the ICC would regard this as the necessary attack.

**Comment 4:** A "potential environmental crime" is not an intentionally launched attack; and hence, it does not meet the ICC requirements.

**Comment 5:** The ICC case would fail, but it would lead to some interesting press coverage. It would also lead to more focused debate on the economic aspects of liability, supported by the arguments of the insurance industry about the increasing uninsurability of some regions of the world.

**Comment 6:** I agree that refusing to take proper measures against global warming is a major crime against humanity.

**Comment 7:** In this case, there is again the government that is implicated. No court has jurisdiction. And, referring specifically to the USA, it didn't ratify the Kyoto Protocol, hence can't be prosecuted. Even if it would have ratified, nobody is dead, hence one major condition to qualify to be prosecuted by the ICC is not fulfilled.

**5.5 Country X, which has not ratified the ICC statute, says it will not cooperate with a case against one of its military officers. The matter is referred to the UN Security Council. Country X says it has a law under which the officer can be tried in its country. The Council agrees that X can handle the matter internally. Time passes without action. At the six-month period specified by the Rome Statute, the ICC is reassured that X will indeed act on the case. Additional time is given and eventually the case is prosecuted, but other countries conclude the result was inadequate and bring the matter to the UN Security Council. Country X threatens to block any action with its veto power. Non-permanent members of the Council say the same rules for the ICC's relationship to the Security Council should apply equally to all countries.**

**Comment 1:** It is true they should, but the structure of the veto is that some pigs are more equal than others, as George Orwell might have said. One would no doubt argue that X should abstain from the voting under article 27(3) of the Charter. X would respond that this is not a "dispute" (see the Namibia Advisory Opinion), does not arise under Chapter VI and that even if it does, the practice of the P5 is quite unprincipled and that a 400-pound gorilla can sit anywhere it wants.

**Comment 2:** Assuming the current status quo in the Security Council, the country with the veto power prevails.

**Comment 3:** X should not be allowed to exercise its veto power. To do so would be to abuse that power granted. Besides, X faces a conflict of interest. If the result of the prosecution is inadequate, the entities concerned may want to bring an appeal up the hierarchy of X's legal system and further, to the ICJ if necessary.

Unfortunately, the UN has to consider if X's participation outweighs other concerns. X, too, has to ask itself if its handling of the case in question falls short of the standard of justice endorsed by the international community after Nuremberg and the decisions of other international criminal tribunals. To leave the UN would be to catalyze drastic shifts of alliances. X has to weigh its options very carefully. It is likely that the case in question will be re-examined. "...The same rules for the ICC's relationship to the Security Council should apply equally to all countries."

**Comment 4:** This is a situation which will inevitably occur among criminals in non-ratifying nations. In the case of veto power, Country X is a party in the issue and should not be allowed to vote. I find it contradictory to the concept of "justice" that Country X be given veto power in a case in which they refuse to prosecute a crime committed by its own military officers.

**Comment 5:** This is a highly improbable scenario. Who would refer the matter to the Security Council? Why is the ICC reassured if the case is under consideration by the Security Council?

What legal right do “other countries” have to conclude that the prosecution by the court was inadequate? If country X is one of the Permanent Five, it can veto any Security Council decision, and would almost certainly be unconcerned if non-veto-possessing countries objected.

**Comment 6:** This is the most interesting and clear case. As per the Rome Statute, if a country has a system to prosecute and is willing to do it, and the ICC concludes that the case was treated properly, there is no way to return the case to the ICC. Satisfaction is subjective. As long as the process was followed, the individual tried and convicted, the country fulfilled its duty as per its own legal system. If the punishment is severe enough or not, is subjective.

#### **General Comments on all the five vignettes:**

**Comment 1:** The Rome Statute, Article 7, requires that crimes against humanity try-able in the ICC must be "part of a widespread or systematic attack against a civilian population." I think it would be difficult to get your situations over this threshold. This is especially so since the Statute is designed to resist expansive interpretation and the ICC judges will know that. I suggest that instead of spending time and energy on trying to squeeze environmental crimes into a reluctant ICC, it would be better to work directly on a specialized court for environmental offenses. This should have both civil and criminal jurisdictions and would be suitable, as the ICC is not, for offenses of omission.

**Comment 2:** There is no reason to limit the range of possible offences committed to crimes against humanity. Offences committed during armed conflict and other types of military operations are in the first place, potential “war crimes”. The criterion that distinguishes war crimes from ordinary crimes under customary international law is the link with armed conflict.

**Comment 3:** The extremely high threshold for environmental crimes makes the ICC a poor venue for prosecuting them. Perhaps a specialized body is needed.



## 6. Conclusions

There is no mood in the UN and UN Missions to prosecute environmental crimes due to military actions in the ICC. No plausible scenarios of military action were constructed that would lead to ICC cases of environmental crime. Surely, crimes such as Iraq's oil damages could come to the ICC, but the increasing awareness of environmental concerns in governments around the world make these actions less likely in the future.

If an individual intentionally created long-term environmental damage that was so grave to be of concern to the international community, then any rational country would want such an individual prosecuted. But concerns of trivial cases are unfounded.



## APPENDICES

Appendix A: Participants in the Study

Appendix B: Excerpts from the Rome Statute and the UN Charter that would be relevant to Environmental Crime

Appendix C: List of Countries that signed and/or ratified the Rome Status

Appendix D: Views concerning the United States and the ICC

Appendix E: International Organizations on combating Environmental Crime



## Appendix A: Participants in the Study

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## **Appendix B: Excerpts from the Rome Statute and the UN Charter that would be relevant to Environmental Crime**

Note: at the end of this appendix is also included an excerpt from the UN Press Release on the seventh session of the Preparatory Commission for the International Criminal Court. The excerpt refers to the Working Group on the Crime of Aggression.

### **ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

The following article(s)/paragraph(s) from the Rome Statute might be relevant in a case of Environmental Crime.

#### **Part 2. Jurisdiction, Admissibility and Applicable Law**

EXCERPT:

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

FULL TEXT:

#### **Article 8: War crimes**

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Willful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Willfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets, which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscribing or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure

be imperatively demanded by the necessities of the conflict;

*(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.*

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

### **Article 9: Elements of Crimes**

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

The UN Security Council can refer a case to the International Criminal Court by acting under Article 39, Chapter VII of the UN Charter.

## **CHAPTER VII OF THE UN CHARTER**

### **Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression**

#### **Article 39**

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

#### **Article 40**

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures, as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

#### **Article 41**

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

#### **Article 42**

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

#### **Article 43**

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and

security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

#### **Article 44**

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

#### **Article 45**

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

#### **Article 46**

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

#### **Article 47**

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating

to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

#### **Article 48**

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remember.

#### **Article 49**

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

#### **Article 50**

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

#### **Article 51**

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

**UN PRESS RELEASE**

**PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT<sup>27</sup>**

Seventh Session, February 26-March 9, 2001

Sylvia a. Fernandez de Gurmendi (Argentina), Coordinator of the Working Group on the Crime of Aggression, drew the Committee's attention to a discussion paper on the group's consultations on the definition of the crime of aggression and the conditions under which the Court would exercise its jurisdiction (document PCNICC/2001/WGICC-UN/RT.1/Rev.1).

She said that the group had held four meetings and two rounds of informal consultations. During the discussions, it had been recognized that the Charter gave responsibility of determining the crime of aggression to the Security Council. There was the belief, however, that there was still a question of what mechanism would apply if the Council failed to recognize a crime of aggression had been committed. Many delegations felt that the Council's prerogatives were primary, but not exclusive. Some had proposed that in a case where the Council did not decide such acts had taken place, the Court could ask the General Assembly to recommend whether it should continue with the case. That, and other proposals, had led to a lengthy and frank exchange of views.

She said that the group had also considered the conditions of the exercise of jurisdiction, as well as the definition of the crime of aggression. There continued to be a division between those preferring a general definition of the crime of aggression and those desiring a highly detailed list of specific and relevant actions. Various delegations also took up the issue of individual responsibility. Others felt the group and the wider Committee should consider intent, as well as the rights of the accused. She expressed gratitude to all delegations for their cooperation in considering these and other delicate issues.

Following Ms. Fernandez de Gurmendi's presentation, the CHAIRMAN [Philippe Kirsch (Canada)] noted that the definition of the crime of aggression and the conditions for the exercise of jurisdiction by the Court were very complex issues, not only in technical terms but also in terms of very fundamental questions of policy. He said the Committee should therefore proceed carefully when considering those issues.

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<sup>27</sup> UN press release, Preparatory Commission for the International Criminal Court. L/2977. 9 March 2001. <http://www.un.org/News/Press/docs/2001/l2977.doc.htm>

## Appendix C: Countries that signed and/or ratified the Rome Statute as of April 2001<sup>28</sup>

Signature indicates intention to ratify the treaty that will establish the Court while ratification indicates full acceptance of the treaty, and a commitment to ensure that the necessary domestic laws are in place to allow for full cooperation, as well as to comply with the spirit of the treaty.

As per April 2001, The Rome Statute was signed by 139 countries and ratified by 29. The table below lists the countries that ratified and/or signed the Rome Statute.

Country	Signed	Ratified
Albania	18 July 1998	
Algeria	28 December 2000	
Andorra	18 July 1998	
Angola	7 October 1998	
Antigua and Barbuda	23 October 1998	
Argentina	8 January 1999	8 February 2001
Armenia	1 October 1999	
Australia	9 December 1998	
Austria	7 October 1998	28 December 2000
Bahamas	29 December 2000	
Bahrain	11 December 2000	
Bangladesh	16 September 1999	
Barbados	8 September 2000	
Belgium	10 September 1998	28 June 2000
Belize	5 April 2000	5 April 2000
Benin	24 September 1999	
Bolivia	17 July 1998	
Bosnia and Herzegovina	17 July 2000	
Botswana	8 September 2000	8 September 2000
Brazil	7 February 2000	
Bulgaria	11 February 1999	
Burkina Faso	30 November 1998	
Burundi	13 January 1999	
Cambodia	23 October 2000	
Cameroon	17 July 1998	
Canada	18 December 1998	7 July 2000
Cape Verde	28 December 2000	
Central African Republic	7 December 1999	
Chad	20 October 1999	
Chile	11 September 1998	
Colombia	10 December 1998	

<sup>28</sup> Unofficial list from the web site of the Coalition for an ICC: <<http://www.iccn.org>>

Comoros	22 September 2000	
Congo (Brazzaville)	17 July 1998	
Costa Rica	7 October 1998	
Cote d'Ivoire	30 November 1998	
Croatia	12 October 1998	
Cyprus	15 October 1998	
Czech Republic	13 April 1999	
Dem. Rep. of the Congo	8 September 2000	
Denmark	25 September 1998	
Djibouti	7 October 1998	
Dominica		February 12, 2001
Dominican Republic	8 September 2000	
Ecuador	7 October 1998	
Egypt	26 December 2000	
Eritrea	7 October 1998	
Estonia	27 December 1999	
Fiji	29 November 1999	29 November 1999
Finland	7 October 1998	29 December 2000
France	18 July 1998	9 June 2000
Gabon	22 December 1998	21 September 2000
Gambia	7 December 1998	
Germany	10 December 1998	11 December 2000
Georgia	18 July 1998	
Ghana	18 July 1998	20 December 1999
Greece	18 July 1998	
Guinea	8 September 2000	
Guinea-Bissau	12 September 2000	
Guyana	28 December 2000	
Haiti	26 February 1999	
Honduras	7 October 1998	
Hungary	15 December 1998	
Iceland	26 August 1998	25 May 2000
Iran	31 December 2000	
Ireland	7 October 1998	
Israel	31 December 2000	
Italy	18 July 1998	26 July 1999
Jamaica	8 September 2000	
Jordan	7 October 1998	
Kenya	11 August 1999	
Kuwait	8 September 2000	
Kyrgyzstan	8 December 1998	
Latvia	22 April 1999	
Lesotho	30 November 1998	6 September 2000
Liberia	17 July 1998	

Liechtenstein	18 July 1998	
Lithuania	10 December 1998	
Luxembourg	13 October 1998	8 September 2000
Macedonia, FYR	7 October 1998	
Madagascar	18 July 1998	
Malawi	3 March 1999	
Mali	17 July 1998	16 August 2000
Malta	17 July 1998	
Marshall Islands	6 September 2000	7 December 2000
Mauritius	11 November 1998	
Mexico	7 September 2000	
Monaco	18 July 1998	
Mongolia	29 December 2000	
Morocco	8 September 2000	
Mozambique	28 December 2000	
Namibia	27 October 1998	
Nauru	13 December 2000	
Netherlands	18 July 1998	
New Zealand	18 July 1998	7 September 2000
Niger	17 July 1998	
Nigeria	1 June 2000	
Norway	28 August 1998	16 February 2000
Oman	20 December 2000	
Panama	18 July 1998	
Paraguay	7 October 1998	
Peru	7 December 2000	
Philippines	28 December 2000	
Poland	9 April 1999	
Portugal	7 October 1998	
Republic of Korea	8 March 2000	
Republic of Moldova	8 September 2000	
Romania	7 July 1999	
Russian Federation	13 September 2000	
Samoa	17 July 1998	
San Marino	18 July 1998	13 May 1999
Sao Tome and Principe	28 December 2000	
Senegal	18 July 1998	2 February 1999
Seychelles	28 December 2000	
Sierra Leone	17 October 1998	15 September 2000
Slovakia	23 December 1998	
Slovenia	7 October 1998	
Solomon Islands	3 December 1998	
South Africa	17 July 1998	27 November 2000
Spain	18 July 1998	25 October 2000

St. Lucia	27 August 1999	
Sudan	8 September 2000	
Sweden	7 October 1998	
Switzerland	18 July 1998	
Syria	29 November 2000	
Tajikistan	30 November 1998	5 May 2000
Tanzania	29 December 2000	
Thailand	2 October 2000	
Trinidad & Tobago	23 March 1999	6 April 1999
Uganda	17 March 1999	
Ukraine	20 January 2000	
United Arab Emirates	27 November 2000	
United Kingdom	30 November 1998	
United States of America	31 December 2000	
Uruguay	19 December 2000	
Venezuela	14 October 1998	7 June 2000
Yemen	28 December 2000	
Zambia	17 July 1998	
Zimbabwe	17 July 1998	

## Appendix D: Views concerning the United States and the ICC

### **D1. President Clinton's statement on December 31, 2000 authorizing the United States to sign the Treaty on the International Criminal Court:**

The United States is today signing the 1998 Rome Treaty on the International Criminal Court. In taking this action, we join more than 130 other countries that have signed by the December 31, 2000 deadline established in the treaty. We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the I.C.C. an instrument of impartial and effective justice in the years to come.

The United States has a long history of commitment to the principle of accountability, from our involvement in the Nuremberg tribunals that brought Nazi war criminals to justice to our leadership in the effort to establish the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Our action today sustains that tradition of moral leadership.

Under the Rome Treaty, the International Criminal Court (I.C.C.) will come into being with the ratification of 60 governments, and will have jurisdiction over the most heinous abuses that result from international conflict, such as war crimes, crimes against humanity and genocide. The Treaty requires that the I.C.C. not supersede or interfere with functioning national judicial systems; that is, the I.C.C. prosecutor is authorized to take action against a suspect only if the country of nationality is unwilling or unable to investigate allegations of egregious crimes by their national. The U.S. delegation to the Rome conference worked hard to achieve these limitations, which we believe are essential to the international credibility and success of the I.C.C.

In signing, however, we are not abandoning our concerns about significant flaws in the treaty. In particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the treaty, but also claim jurisdiction over personnel of states that have not. With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not.

Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the I.C.C. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction.

But more must be done. **Court jurisdictions over U.S. personnel should come only with U.S. ratification of the Treaty.** The United States should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction. **Given these concerns, I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.**

Nonetheless, signature is the right action to take at this point. I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide, and that signature increases the chances for productive discussions with other governments to advance these goals in the months and years ahead.

*Source:* ICC Now, January 2, 2001

**D2. UN Secretary-General Kofi Annan** issued a statement praising Clinton's action, saying he was "well aware of the difficulties" Clinton faced and congratulating "him on his courage and far-sightedness in overcoming them." Annan added that the court "represents no threat to states with an organized criminal justice system. On the contrary, it is designed only to protect those most vulnerable people whose own government, if they have one, is unable or unwilling to prosecute those who violate their own fundamental human rights" (Lawrence Knutson, Associated Press/Nando.net, 31 Dec).

*Source:* ICC Now listserv, January 2, 2001

**D3. The following transcript is of the confirmation hearings of General Powell for the position of US Secretary of State:**

"SEN. HELMS: Now, let's talk about the International Criminal Court. I don't know that you've had much chance to think about that since you became the nominee. The International Criminal Court Treaty has raised the ire of a lot of people, including me, because the court claims the authority to indict and try and imprison American citizens, including our service people -- Army, Navy and all the rest -- and national security officials -- like the secretary of State, I might add -- even the United States has not -- even though the United States has not ratified the treaty. Now, as a former Joint Chiefs Chairman and future secretary of State -- that "future" is upon us -- can I have your commitment to work with Congress to decisively address the threat to American citizens and American sovereignty posed by this international kangaroo court?

GEN. POWELL: Yes. I had reservations about that treaty when it was in the development process when I was chairman of the Joint Chiefs of Staff and it was coming along, and I have reservations about it now. And I don't think you can be standing on your tippy-toes waiting for the Bush administration to ask for any -- any -- movement toward ratification of the treaty. As President Clinton said when he signed it, he recognized that there were difficulties with the treaty, and special difficulties within the Pentagon, who, as I understand it, are not supportive of that treaty, obviously. And he said in his signing statement that he signed it because he wanted to be able to influence future discussions on the treaty. But when you do sign a treaty, in legal terms you sort of bind yourself to the purpose and objectives of the treaty. But we have no plans to ask for ratification of the treaty.

SEN. HELMS: Well, we'll send somebody down there to strike the signature of that ambassador."

*Source:* ICC Now listserv, January 18, 2001

**D4. Donald Rumsfeld, Bush's nominee for defense secretary, has already made it clear he opposes the tribunal**, and in a joint letter with 11 other prominent former policymakers in November warned that "American leadership in the world would be the first casualty" of the court (James Bone, London Times/Montreal Gazette, 2 Jan)

The majority of the republicans, among them the soon-to-be Secretary of Defense Donald Rumsfeld, are afraid of the treatment that American soldiers could receive before the Tribunal because of their behavior as the 'police of the world'.

*Source:* ICC Now, January 2, 2001

**D5. U.S. conservatives are organizing an assault on the U.N.-sponsored war crimes tribunal**, saying President Clinton's surprise New Year's Eve signature on the treaty must be swiftly and surely erased. Many in Washington are demanding that the incoming Bush administration "unsign" the treaty, which legal scholars say would be an unprecedented repudiation of an international agreement. Conservative lawmakers also are examining changes in domestic law that could nullify Mr. Clinton's accession to the 1998 agreement creating the war crimes tribunal.

Specifically, they are mulling the revival of a bill that expressly forbids any U.S. agency or program from cooperating with the treaty organization in any way. "If a mistake were made, a president would have the ability to correct it. This is the same thing," said John Bolton, a State Department official in the 1989-93 Bush administration and now a senior vice president at the American Enterprise Institute. He demanded the incoming administration "march up to New York with a bottle of White-Out."

*Source:* ICC listserv, January 9, 2001.

On November 29, 2000, in a clear violation of the American way, Republican Senator Jesse Helms of North Carolina preempted the administration's transcending responsibility to conduct foreign policy by dispatching his press spokesperson to the United Nations, where he held a press conference to spotlight his diehard opposition to the treaty. ... Helms said that he will make his "American Service members Protection Act" a "top legislative priority," referring to the bill that would not only spike US participation in the court, but would punish countries that ratified the treaty, and would severely restrict future American support of UN peacekeeping.

... Helms produced a chorus of former officials to echo his intervention at the UN. On that same day - a coincidence? - a letter supporting the Helms bill was released by a dozen foreign policy heavy hitters, including Henry Kissinger, Jeane Kirkpatrick, George Shultz, and James Baker III - a sad demonstration of how far we've come from the post-World War II generation of internationalists who, in fact, gave first expression to the idea of an international war crimes tribunal.

*Source:* ICC listserv, November 30, 2001.

**D6. Benjamin Ferencz, who prosecuted Nazi war crimes at Nuremberg and supports the ICC**, said fears expressed by the academic and military communities when the Rome Statute was created "were unfounded" and could be allayed "by making certain corrections"

*Source:* Noah Adams, NPR *All Things Considered*, January 1, 2001

**D7. The treaty is supported by nearly every US ally**, including Canada, the European Union, and NATO (minus Turkey).

Without US involvement, the court will still go forward, but it will likely have a more difficult time establishing legitimacy. Furthermore, by not joining, the US could weaken its alliances and lose a say in the administration of global justice, an area it has traditionally led.

"This could create a division between the US and its closest military allies," says Richard Dicker of Human Rights Watch in New York. "That could make consensus on other foreign-policy issues more difficult to achieve."

The Joint Chiefs of Staff have spearheaded resistance to the court, overcoming moderate support for the measure in the Justice Department and the State Department, analysts say. Senate Foreign Relations Committee chairman Jesse Helms, a North Carolina Republican, has said he would block ratification if the measure reached the Senate.

The US has tried to persuade the court's preparatory commission to grant exemptions for US nationals.

"[An American exemption] can't work," says William Pace, who heads the Coalition for an International Criminal Court in New York. "This type of position undermines US leadership."

Throughout history, the US has championed war-crimes courts, starting with the establishment of the International Military Tribunal in Nuremberg that prosecuted the Nazis following World War II.

*Source:* ICC Now listserv, September 28, 2000

**D8. In August 2000, Britain Foreign Secretary, Robin Cook, opposed the US position**, telling Washington that its objections were misplaced' and that the treaty would not expose US military or civilians to vexatious prosecutions, as the White House and Republican congressional leaders believe.

At an intergovernmental EU meeting in Paris on October 31, the British delegate Elizabeth Wilmshurst, who is Mr Cook's deputy legal adviser, opposed parts of a plan for European countries to unite in opposition to Washington's demand for Americans to be exempted.

The demand is among the key issues under discussion at the UN preparatory commission meeting on the international court, which began yesterday.

Campaigners say that a strong common position by EU members is crucial to resisting US efforts to secure an exemption. A weak position by the EU will undermine the efforts of other countries to stand up to the US, Richard Dicker, of Human Rights Watch, said. Britain is playing a dangerous game which puts the effectiveness and credibility of the court at risk.'

British sources agree that Ms Wilmshurst successfully objected to part of a lobbying note' drafted by France for presentation to the US. But Britain remained committed to the EU common position agreed in Paris, the sources said.

The US is one of only seven countries - the others include China, Iran, Iraq and Libya - which voted against the plan to set up the court, known as the Rome treaty, in 1998.

*Source:* ICC Now, December 1, 2000

**D9. According to the "International Issues and the UN" study conducted by the EarthAction, two-thirds of Americans (66%) would favor the U.S. signing a treaty to set up an International Criminal Court, among other issues.**

A regionally representative sample of 1,010 Americans age 18 or older was interviewed by telephone between October 6 and October 8, 2000. To ensure a reliable and accurate representation of the total national adult population, completed interviews were weighted to known proportions for age, gender, race, and geographic region. The margin of error for the total sample is +/-3.1%.

The following is the actual question posed in the survey: "A treaty has been negotiated to set up an International Criminal Court to bring individuals to justice for crimes of genocide, war crimes or other major abuses of human rights if their own country won't try them. Would you favor or oppose the US signing the treaty?"

Favor: 66%; Oppose: 24%; Don't know/Not sure (VOL.): 10%

*Source:* ICC Now listserv, November 7, 2000

**D10. 13 September 2000 - HEADLINE: UK Lawyer Lectures Students - and U.S. – on Human Rights**, Chicago Daily Law Bulletin, by Daniel C. Vock

This article presents Robertson's critique of the U.S. opposition to the ICC. Geoffrey Robertson, an internationally renowned human rights advocate, stated, "The government's refusal to participate in international human rights treaties tarnishes America's reputation among nations", in speaking to the Northwestern University law students and faculty. He said, "what America has to lose in sovereignty by joining the court is very minimal..." Robertson goes on to explain, "On the other hand, America could gain greatly by joining in the agreements because it has the power to intellectually dominate the ICC and internationally regulatory system while providing the world with moral leadership".

*Source:* ICC Now listserv, September 21, 2000

**D11. In an article which appeared in the Washington Times August 29, 2000, Lloyd Axworthy, Canada's minister of foreign affairs, said in regard to the ICC:**

"Such cooperation can be extended to finding ways for the United States to ratify two other essential components of the human security agenda – the Ottawa Convention banning anti-personnel land mines and the Rome Statute of the International Criminal Court. These institutions do not threaten American security; rather they enhance it, and exemplify and uphold the fundamental values that underpin American democracy and liberty."

*Source:* ICC Now listserv, August 30, 2000

**D12. UN Millennium Summit – September 6-8, 2000**

Government statements on the International Criminal Court to the UN Millennium Summit, 6-8 September 2000

**Argentina:** H. E. Doctor Fernando de la Rúa, President of the Republic Argentina "The Argentinean Republic wants to express its satisfaction because the international community has achieved, before the conclusion of the millennium, the creation of an international penal court, with general and permanent character to judge serious international crimes. It is an institution that will strengthen the founded

international system in the law and the full validity of the human rights."

**Austria** - H.E. Mr. Thomas Klestil, Federal President of the Republic of Austria "Today it might well be unthinkable to deal with any one of the global issues without the participation and contributions by civil society. The way we address today the issues of human rights, of the environment, of disaster relief and development co-operation, of security and, in particular, of human security, to mention only a few, has been characterized by new forms of dialogue, participation and commitment on the part of civil society. The successful completion of the negotiations for the landmines treaty as well as the Rome process towards an International Criminal Court would not have been possible without the truly innovative and productive response on their part."

**Canada** - H.E. Mr. Jean Chretien, Prime Minister of Canada "We must work harder to deny the agents of violence and conflict their sources of supply. By halting the proliferation of small arms and light weapons. And by controlling the illicit trade in diamonds. We must keep moving ahead with initiatives that put the security of people first. The Ottawa Treaty on Landmines and the Statute of the International Criminal Court are milestones marking our way."

**Chile** H.E. Mr. Ricardo Lagos Escobar, President of the Republic of Chile "Globalization carries with it responsibilities and Chile has assumed its responsibilities without hesitation. As evidence of this, we have committed ourselves to disarmament policies; to United Nations peacekeeping forces; to the International Criminal Court; to regional and universal instruments for the defense of human rights and democracy; to the fight against racism, xenophobia and other forms of discrimination; to the protection of the environment; to the fight against drug trafficking and organized transnational crime; and to the promotion of free trade at all levels. Chile has been and will continue to be present on all the fronts of globalization."

**Croatia** - H.E. Mr. Stipe Mesic, President of the Republic of Croatia "Speaking of undertakings, one of the vehicles which can help us best in arranging this world is certainly international law, and in this regard the role of the UN and of the Secretary General as the depositary of more than 500 treaties is of irreplaceable and invaluable significance. In endeavouring to safeguard and reinforce the elementary norms of international humanitarian law, the Security Council has also established ad hoc criminal tribunals for the former Yugoslavia and Rwanda. However, genuine progress towards universal protection will be achieved through the International Criminal Court"

**Germany** - H.E. Mr. Gerhard Schroeder, Chancellor of the Federal Republic of Germany "The German Government strongly advocates the early entry into force of the Statute of the International Criminal Court which is to try cases involving the most serious international crimes, such as genocide."

**Italy** - Prof. Giuliano Amato, the Prime Minister of the Italian Republic "Another key point is the effective defense of universal human rights, as a guarantee of a fairer and more democratic international system. We have made progress in recent years in this respect, but much more can be achieved, especially once that we reach the required number of ratifications for Rome Treaty establishing the International Criminal Court. In an era when internal conflicts abound, overcoming intolerance in every form is at the same time one of the most effective ways to prevent conflict."

**Libya** - H.E. Mr. Abdurrahman Shalghem, Secretary of the General People's Committee for Foreign Liaison and International Cooperation "The objective behind the establishment of the International Criminal Court is the punishment of the perpetrators of the most serious crimes against international security, but the Rome Statute is designed to try only the weak. Such a statute cannot be accepted, neither can it be signed or ratified unless it is modified in a manner that guarantees the trial of all perpetrators of acts of aggression, drug smugglers and their trade-partners, and those responsible for group massacres of

innocent people, as well as those who commit aggression against international forces."

**Liechtenstein** - H.E. Mr. Mario Frick, Prime Minister of the Principality of Liechtenstein "The respect for and the promotion of human rights and the rule of law have been a high priority of Liechtenstein's UN engagement throughout our 10 years of membership. Within the group of like-minded countries, Liechtenstein participated actively in the work to create the International Criminal Court, one of the outstanding achievements in the area of international law, and we hope that the Court will become operational soon. The ICC will lead to full accountability for the commission of the most serious crimes under international law and it has a strong potential to help prevent conflicts."

**Netherlands** - H.E. Mr. Wim Kok, Prime Minister of the Kingdom of Netherlands "The international rule of law needs to be strengthened. The International Court of Justice, the Yugoslavia Tribunal and the Organisation for the Prohibition of Chemical Weapons, all located in The Hague, contribute to that goal. In the near future they will be joined by the International Criminal Court."

**New Zealand** - Her Excellency The Right Hon. Helen Clark, Prime Minister of New Zealand "New Zealand places great importance on the rule of law and on the peaceful settlement of disputes. We have participated actively in the development of international law. This year we have responded to the Secretary-General's request to member states to sign or ratify as many of the 25 core treaties as possible. We have also undertaken a full review of the extent of our participation in the international legal framework with a view to becoming party to more treaties. As a first step in that process, at this summit we are carrying out seven fresh treaty actions, including signature, ratification, or accession to five of the 25 core treaties. This week we are ratifying the Rome Statute of the International Criminal Court."

**Republic of San Marino** - the Most Excellent Captain Regents of the Republic of San Marino "San Marino is committed to the International Criminal Court, it has strongly supported the abolition of death penalty worldwide, and has constantly participated in international solidarity projects to alleviate the suffering of man women and children."

**Samoa** - H.E. Mr. Tuiloma Neroni Slade, Chairman of the Delegation of Samoa "Samoa believes most strongly in the need for and the purposes of the International Criminal Court, and will continue to play its part in the development of the Court. Humanity needs more than ever a fair, effective and independent instrument of international criminal justice."

**Slovakia** - H.E. Mr. Mikulás Dzurinda, Prime Minister of the Slovak Republic "Standing on the threshold of the new century, the international community must focus its endeavors on ensuring full respect for international law and, in particular, human rights, whose violations have recently been grave and numerous. Hence, Slovakia fully supports the expedient constitution of an International Criminal Court and subscribes to the Secretary-General's appeal to put an end to the culture of impunity."

**Somali Republic** - H.E. Mr. Abdiqassim Salad Hassan, President of the Somali Republic "A Somali government which is the off-spring of the efforts of the Somali civil society is bound to be responsive to the demands of the renewed, democratized and energized UN. The new Somalia and its Third Republic are willing to re-dedicate themselves to an international legal framework which values the rights of the child, is committed to the elimination of all forms of discrimination against women and is ready to pledge full support for the effective institutionalization of the International Criminal Court in Rome."

**Spain** - H.E. Mr. José María Aznar, President of the Government of the Kingdom of Spain "Needless to say, Spain will vigorously support any and all efforts to find consensus solutions and uphold agreements. Specifically, ratification by my country of the Rome Treaty establishing an International Criminal Court

is very near and we trust that it will be implemented promptly."

**Trinidad and Tobago** - H.E. Mr. Basdeo Panday Prime Minister of the Republic of Trinidad and Tobago "We record our appreciation for the United Nation's positive response when Trinidad and Tobago moved to revive the concept of the establishment of a Permanent International Criminal Court. It is our firm conviction that the crime of illicit drug trafficking should be included in the jurisdiction of the International Criminal Court."

## Appendix E: International Organizations on combating Environmental Crime

### E1. UNEP Steps up efforts to combat environmental crimes

**Geneva, Switzerland, July 16, 1999 (ENS)** - Environmental crime is becoming a serious global problem, though the immediate consequences of an offense may not be obvious or severe. The cumulative costs in environmental damage and the long range toll in illness, injury, loss of biodiversity and continued depletion of the ozone layer may be considerable.

The United Nations Environment Programme (UNEP) hosted a workshop in Geneva, Switzerland, from July 12 to 14 aimed at identifying stricter measures to combat environmental crimes including illegal trade in endangered species of wild fauna and flora, use of ozone depleting substances and production of hazardous wastes. These crimes continue to flourish despite various measures aimed at eliminating them.

At the international level, the participants say environmental crime has two main aspects. First, deliberate noncompliance with Multilateral Environmental Agreements (MEAs) by the States parties to them. Second, deliberate evasion of environmental laws and regulations by individuals and companies. **Where these activities involve movements across national boundaries, they are defined as international environmental crimes.** [emphasis added]

A proliferation of MEAs has not succeeded in minimizing various environmental crimes. For example, there are indications that despite a ban by the European Union and other developed countries of production of CFCs and halons and controlled importation of ODS, an active black market still exists. Also, some developing countries could be a source of illegal trade in ozone depleting substances.

More than 50 experts from developed and developing countries and countries with economies in transition participated in the conference. Specialists with expertise in detection, enforcement and prosecution of environmental crimes were also in attendance.

UNEP participants came from the three convention secretariats: CITES, Basel and Ozone conventions. Independent relevant bodies such as Interpol and World Customs Organization participated with resource persons and facilitators. The workshop examined recommendations for improved enforcement of and compliance with the three identified MEAs, particularly at the national level. Recommendations for more effective coordination and cooperation between national enforcement authorities and convention secretariats were also discussed.

Continuous dialogue and collaboration between different groups of countries and the convention bodies would ensure coordination of tactics in curbing environmental crimes, the participants concluded. The watchful eyes of an informed public are also of great importance. A regular exchange of information on how illegal trade and environmental crimes are dealt with under different regimes and jurisdictions will be crucial in combating the crimes.

Support for the workshop came from the G-8 Environmental Ministers' Meeting, held in April 1998, and a financial contribution from the Government of the United Kingdom. The Governments of Canada and Germany also provided financial support to ensure success of the workshop.

"UNEP is pleased that the fight against international environmental crime received a substantial boost after the environment ministers from the G-8 countries announced a range of measures designed to deter

and apprehend traders in banned products, materials and substances throughout the world, said Klaus Toepfer, UNEP's executive director.

"The list includes endangered species, ozone-depleting substances and hazardous wastes," Toepfer said. "The international community should be vigilant and should take concrete measures, on a regular basis, to address compliance and enforcement of international agreements in earnest."

Source: Environment News Service (ENS) 1999.

## **E2. Council of Europe: The European Convention on the Protection of the Environment through Criminal Law**

The Council of Europe's *Convention on the Protection of the Environment through Criminal Law*, opened for signature on 4 November 1998, was signed by 12<sup>29</sup> countries as of April 2001. It will enter into force with three ratifications.

The Convention is significant because it represents the first international convention to criminalise acts causing or likely to cause environment damage. Criminal law, a last resort solution, has long been considered as inappropriate in this field. The Basel Convention on the Control of Transboundary Movements of Wastes and Their Disposal does require its signatories to take "appropriate measures in national law and also to impose sanctions". Other conventions, such as the Convention of the International Trade in Endangered Species (CITES), provide for sanctions against signatories that do not abide by the obligation in CITES. It is, however, current practice to impose administrative or civil law sanctions for such violations.

Excerpts from the convention:

### *Serious environmental offences*

The Convention requires under Article 2 signatories to criminalize various serious offences as follows:

- release of "substances or ionizing radiation into air, soil, or water which causes death or serious injury to any person or creates a significant risk of causing death or serious injury";
- "unlawful" release of "substances or ionizing radiation into air, soil, or water which causes or is likely to cause their lasting deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals, or plants";
- "unlawful disposal, treatment, storage, transport, export or import of hazardous waste, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants" and "unlawful operation of a plant in which a dangerous activity is carried out" presenting the same risk; and
- "unlawful manufacture, treatment, storage, use, transport, export or import of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants".

Article 2 thus provides for specific environmental offences, emphasizing the protection of environmental media, i.e., of the air, the soil and water, the protection of human beings, protected monuments, other protected objects, property, animals, and plants from environmental dangers. While the first two offences

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29 Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania, and Sweden

are pollution offences, the latter primarily covers pre-stages where the illegal handling of dangerous installations and of specific dangerous substances (radioactive substances, hazardous waste) is likely to cause death or serious injury to persons or harm the environment.

#### *Illegal conduct*

Article 4 extends the scope of the Convention to a wide range of environment-related illegal conduct by a reference to "infringement of the law, an administrative regulation or a decision taken by a competent authority". Signatories can choose to impose criminal sanctions and/or measures, or administrative sanctions and/or measures. The latter can include administrative fines, but also confiscation and reinstatement of the environment. Other measures of a punitive nature may be the withdrawal of a permit, the prohibition to continue environmentally dangerous processes or an order to reduce the discharge of pollutants, professional disqualifications or even, in minor cases, a simple warning for the violation of which could lead to a fine.

#### *Prosecutions and reparations*

- Under Article 6, signatories must impose imprisonment and pecuniary sanctions and may require violators to rehabilitate the environment.
- Article 7 provides for confiscation of profits. This provision is optional.
- Article 9 requires signatories to impose corporate liability, without excluding criminal proceedings against a natural person.

An optional provision is that a signatory can require reinstatement of the environment within the frame of criminal proceedings, especially before the trial. The laws of some countries utilize different means of reparation, including the reinstatement of the environment, or the compensation of victims, before the prosecution of the offence or during the trial. By allowing perpetrators to undo the harm caused to the environment, the Convention clearly gives priority to the overriding interest of the protection of the environment. If the conditions of reinstatement are respected, criminal charges may be dropped, which is a serious incentive to polluters to reinstate the environment.

#### *Recognition of the role of NGOs*

A potentially important procedural right is that signatories, by way of a declaration to the Convention, can provide for the rights of environmental non-governmental organizations (NGOs) to participate in criminal proceedings (Article 11). Because global and national NGOs proactively try to protect the environment, they can be important actors in deciding to bring lawsuits and exert pressure on agencies and law enforcement to enforce environmental laws. In some countries, the right for environmental NGOs to participate does not exist. The principal reason to allow NGOs access to environmental proceedings is that criminal law in the environmental field protects interests of a highly collective nature. However, the fact that this provision was drafted as an opting-in clause shows that the issue of permitting NGOs access to criminal proceedings remains controversial. Only a few countries have recognized such right.

It is hoped that the Convention will soon gather a sufficient number of ratifications to enter into force and that other Council of Europe member States or even non-members will join it.

*Source:* Council of Europe, Crime Problems Division, Directorate of Legal Affairs,  
<<http://www.coe.fr/>>